

DRAFT

ADMINISTRATIVE POLICY



**STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS**

TITLE: MINIMUM WAGE ACT APPLICABILITY

NUMBER: ES.A.1

**CHAPTER: [RCW 49.46](#)
[WAC 296-128](#)**

REPLACES: ES-005

ISSUED: 1/2/2002

REVISED: 6/10/2004

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

1. When does [Chapter 49.46](#), the Washington Minimum Wage Act, apply?

The Washington [Minimum Wage Act \(MWA\), RCW 49.46](#), establishes a minimum wage for employees in Washington State in [RCW 49.46.005](#) and [RCW 49.46.020](#). The MWA also requires employers to pay overtime wages of at least one and one-half an employee's regular rate of pay for hours worked in excess of 40 in a week, per [RCW 49.46.130](#).

The MWA is an additional protection to workers employed in Washington State who are already protected by the [Industrial Welfare Act \(IWA\), RCW 49.12](#). While the IWA makes it illegal for an employer to employ workers at wages that are not adequate for their maintenance or under conditions of labor detrimental to their health, the MWA specifically sets forth an "adequate" wage (the current statutory minimum) and provides the additional protection of overtime compensation.

The MWA is in addition and supplementary to not only the IWA, but to all other standards (state, federal or local law, ordinance, rule or regulation) relating to wages, hours and working conditions. See [RCW 49.46.120](#). If, however, the alternative standard provides either more protection or is more favorable to an employee, the more protective authority will apply. Individuals with questions as to the more protective standards found in federal law should contact the U.S. Department of Labor, Wage and Hour Division.

DRAFT

[WAC 296-128](#) generally contains rules promulgated subject to [RCW 49.46](#). All of these rules have the same force of law as the provisions of [RCW 49.46](#) itself.

2. Which employers are subject to [RCW 49.46](#)?

Generally, an “employer” under [RCW 49.46.010\(4\)](#) is “any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.”

Public agencies subject to the MWA may nonetheless, in certain situations, be exempt from the requirement to pay overtime wages. See [ES.A.8.1](#) Overtime.

Employers who do business in other states, in addition to Washington, may be engaged in interstate commerce and are subject to the Fair Labor Standards Act (FLSA), in addition to the MWA. FLSA is administered by the U.S. Department of Labor, and clarification must be obtained from that agency.

Employers must follow the laws that are more protective to the worker when there is a difference between the applicability of state and federal laws.

3. Which employees are subject to the protections of [RCW 49.46](#)?

The protections of the MWA apply to all “employees.” An “employee” is defined as “any individual employed by an employer” *except* those employees specifically excluded by the legislature in [RCW 49.46.010\(5\)\(a\) through \(n\)](#). Minimum wage is not required for employees who are excluded from the MWA. Note that there are additional exceptions to overtime, and as a result an employee can be entitled to minimum wage even if overtime pay is not required. See [RCW 49.46.130](#) and administrative policy [ES.A.8.1](#), related to overtime.

4. Definition of employ. “Employ” means to engage, suffer or permit to work. See [RCW 49.46.010 \(3\)](#) and [WAC 296-126-002 \(3\)](#).

See [ES.C.2](#) for a detailed discussion of the hours worked for which the employee must be paid at least the applicable minimum wage. The same concepts apply to employers and employees subject to the MWA.

5. Independent contractors are not employees. A bona fide independent contractor is exempt from the MWA because that person is not “employed” by an employer. However, an employer cannot avoid conforming to the MWA by merely referring to someone as an “independent contractor.” Whether a worker is an independent contractor must be carefully evaluated on a case-by-case basis.

6. Which employees are excluded from the protections of the MWA?

DRAFT

The following exemptions are found in [RCW 49.46.010\(5\)](#). Application of these exemptions depends on the facts, which must be carefully evaluated on a case-by-case basis:

- (a) **Certain agricultural employees:** An individual who is employed as a hand harvest pieceworker in the region of employment, *and* who commutes daily from his or her permanent residence to the farm upon which he or she is employed *and* who has been employed in agriculture less than thirteen weeks during the preceding calendar year. Each of the elements listed above must be met in order for the exemption to apply.

Note: All other agricultural workers *are* covered under MWA. The employer has the burden of proving that agricultural workers fall within the above exemption.

- (b) **Casual Laborers:** Any individual “employed in casual labor in or about a private home” *unless* the labor is performed in the course of the employer’s trade, business, or profession.

Casual refers to employment that is irregular, uncertain or incidental in nature and duration. This must be determined on a case-by-case basis by looking at the scope, duration and continuity of employment. Employment that is intended to be permanent in nature is not casual, and is not exempt, regardless of the type of work performed. Employment of housekeepers, caregivers, or gardeners on a regular basis is not considered “employed in casual labor” and such workers may be subject to the protections of the MWA.

- (c) **Executive, Administrative, Professional, Computer Professional or Outside Sales.** [See ES.A.9](#) for further discussion of the “white collar” exemptions.

Note: The rules promulgated by the Washington State Department of Personnel affecting civil service employees have no bearing on department rules for wage and hour purposes. Public employees in executive, administrative, or professional positions are included in the “salary basis” regulation, [WAC 296-128-532](#) and 533. *See administrative policy ES.A.9.1.*

- (d) **Volunteer work for an educational, charitable, religious, state or local governmental body or agency or non-profit organization:** Any person engaged in the activities of the above type of organizations as long as there is no employer-employee relationship between the organization and the individual *or* the individual gives his or her services gratuitously to the organization

The department uses the following interpretation in determining whether workers are volunteers exempt from the MWA: Individuals will be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer. Individuals who volunteer or

DRAFT

donate their services, usually on a part-time basis, for public service or for humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the entities that received their services. However, if these people are paid for their services beyond reimbursement for expenses, reasonable benefits or a nominal fee, they are employees and not volunteers.

Individuals do not lose their volunteer status if they receive a nominal fee or stipend. A nominal fee is not a substitute for wage compensation and must not be tied to productivity. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual fee without losing volunteer status.

An individual will not be considered a volunteer if he or she is otherwise employed by the same agency or organization to perform similar or identical services as those for which the individual proposes to volunteer. Any individual providing services as a volunteer who then receives wages for services, is no longer exempt and must be paid at least minimum wage and overtime pay for hours worked in excess of 40 hours per workweek. Unpaid employment is unlawful. An employee-employer relationship is deemed to exist where there is a contemplation or expectation of payment for goods or services provided.

Note that this interpretation is identical to that used to determine whether a worker is a volunteer and thus exempt from the protections of [RCW 49.12](#), the Industrial Welfare Act.

Volunteers are not allowed in a "for-profit" business. Any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer, who permits any individual to work, is subject to the provisions of the MWA.

- (e) **Individuals who are employed full time by a state or local governmental agency or nonprofit educational, charitable, or religious organization and who also do volunteer work for the agency.** Such individuals are exempt from the MWA only with respect to the voluntary services.
- (f) **Newspaper vendors or carriers.** The department construes "newspaper vendors or carriers" very narrowly and does not include magazine carriers or vendors, those who distribute advertising circulars, or persons who sell or distribute literature at sporting events etc.
- (g) **Employees of carriers subject to Part I of the Interstate Commerce Act (Railroads and Pipelines):** Part I of the Interstate Commerce Act is limited to railroads and pipelines only. Interstate motor carriers are covered under Part II of the Interstate Commerce Act and are not exempted from the MWA by this definition.

DRAFT

Non-railroad employees may also be subject to this exemption from the MWA if their activity is integral to the interstate commerce of the railroads. Whether non-railroad employees are exempt should be considered on a case-by-case basis.

- (h) **Forest protection and fire prevention.** Any persons engaged in forest protection and fire prevention activities.
- (i) **Employees of charitable institutions charged with child care responsibilities.** Employees of charitable institutions charged with child care responsibilities as long as the charitable institution is “engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States.” This exemption applies to non-profit camps run by such institutions. It would not apply to employees of such institutions employed to work in adult day care or childcare facilities operated by such institutions.

"Charitable institution" traditionally includes churches and other organizations commonly set up under the not-for-profit corporations act if they are recognized by the United States Internal Revenue Service under the tax exemption provision, section 501(c)(3). Typical examples may include the YMCA or YWCA, Girl Scout or Boy Scout organizations, etc. "Charged with child care responsibilities" would include reference to this activity in the organization's by-laws and incorporation documents.

- (j) **Individuals who reside or sleep at place of employment or who are on call.** Any employee who, by the nature of the job duties, is required to sleep or reside at the place of employment, if he or she spends a substantial portion of work time “on call” and not engaged in the performance of active duties.

Merely residing or sleeping on the premises at the place of employment does not exempt the individual from the MWA. In order for an individual to be exempt, the individuals' duties must require that they sleep or reside on the premises *and* that they be available and subject to perform their duties as part of their job.

Typical examples of this exemption may include apartment managers or residential maintenance personnel, hotel/motel managers, managers of self-storage facilities, ambulance drivers, etc., who are required by the employer to reside or sleep on the premises where they work and who are not engaged in the performance of active duties.

- (k) **Inmates and others in custody.** Residents, inmates or patients of state, county or municipal correctional, detention, treatment or rehabilitative institution would not be required to be paid minimum wage if they perform work directly for, and at,

DRAFT

the institution's premises where they are incarcerated, and remain under the direct supervision and control of the institution. State inmates assigned by prison officials to work on prison premises for a private corporation at rates established and paid for by the state are not employees of the private corporation and would not be subject to the MWA.

(l) **Elected or appointed public officials and employees of the state legislature.**

The MWA does not apply to any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature.

(m) **Washington State ferry crews.** Vessel operating crews of the Washington State ferries, as long as the Department of Transportation operates the ferries.

(n) **Crews of non-American vessels.** The MWA applies to persons employed as seamen on an American vessel but does not apply to seamen employed on non-American vessels.

7. What is the scope of the department's authority under the Minimum Wage Act?

Assuming that the type of employees and employers involved in a particular case are covered under the MWA, the department has the authority to investigate and gather data and may enter workplaces, examine and copy records, question employees and investigate such facts conditions practices or matters deemed necessary or appropriate to determine whether there has been a violation of the MWA. [RCW 49.46.040](#).

[See ES.D.1](#) for a complete discussion of the record keeping types of records employers subject to the MWA must maintain and produce to the department and to employees.

8. What is the department's enforcement authority regarding violations of the Minimum Wage Act?

If, after investigation, the Department determines that there has been a violation of the MWA in that an employer has paid an employee less than minimum wage or has not paid overtime to an entitled employee, the department may, on the employees' behalf, bring a civil action against an employer to recover unpaid wages. An employee also has the express right to bring a private action for unpaid wages or overtime and to seek costs and attorney fees. See [RCW 49.46.090\(1\)](#). Also [see ES.A.5](#) for additional discussion of payment of wages less than minimum wage and the employer's liability.

An employer who fails or refuses to comply with the record keeping requirements found in the MWA and in the department's corresponding rules or an employer who refuses to cooperate with the department's reasonable investigation could be subject to criminal prosecution. See [RCW 49.46.100](#).

DRAFT

An employer who pays less than minimum wage or violates other provisions of the MWA (including overtime) could also be subject to criminal prosecution under [RCW 49.46.100](#). Also [see ES.A.3](#) for definition of wage and methods of calculation to determine whether employee has been paid the applicable minimum wage.

Finally, an employer who fires or discriminates against an employee because the employee has complained to the department about unpaid wages or any other provision of the MWA (including record keeping responsibilities) may be subject to criminal prosecution under [RCW 49.46.100](#). The department does not have the authority to assert criminal charges and criminal fines against such employers. A county or city prosecutor must take such action.

Notwithstanding the department's authority to investigate and bring legal action against an employer for violations of [RCW 49.46](#) on behalf of workers, aggrieved workers retain the right to seek private counsel in order to file a civil action against the employer.